No. 85-969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LAWRENCE E. GRAY, EDWARD J. MURTY, JR.
and PETER MCC. GIESEY,
Petitioners,

v.

OFFICE OF PERSONNEL MANAGEMENT,
AN AGENCY OF THE U.S. GOVERNMENT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT

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QUESTION PRESENTED FOR REVIEW

Whether the Court below erroneously, and in conflict with other circuits, interpreted the Civil Service Reform Act of 1978 to bar suits by federal employees, under Section 701 *et seq.* of the Administrative Procedure Act alleging arbitrary and capricious agency personnel action.

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Treasury Employees Union (NTEU) is the third largest federal sector labor organization. Pursuant to Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, NTEU is the exclusive bargaining representative of approximately 110,000 federal employees throughout the nation. NTEU represents the employment interests of the members of its bargaining units, *inter alia*, by negotiating collective bargaining

agreements with federal agency employers, by arbitrating grievances under such agreements, and by representing them before administrative agencies and the federal courts.

Many of NTEU's members are classified in civil service positions pursuant to the Classification Act, 5 U.S.C. 5101 *et seq.* Thus, the interests of NTEU and the employees it represents will be affected by any decision in this case, which concerns the jurisdiction of the federal courts to hear federal employee challenges to their position classifications. Furthermore, the Court's decision may affect the outcome of a case now pending in the District of Columbia Circuit (*National Treasury Employees Union et al.* v. *Egger et al.*, No. 84-5594) in which NTEU and several of its members have appealed from a district court decision dismissing their complaint for the same reasons the D.C. Circuit upheld the dismissal in the instant case. Thus, NTEU and its members have a significant interest in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 771 F.2d 1504 (D.C. Cir. 1985) and contained in Petitioner's Appendix ("Pet. App.") at 1a to 22a. The opinion of the District Court for the District of Columbia is not reported, but is found at Pet. App. 23a to 33a.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was filed on August 9, 1985. (Pet. App. at 34a to 35a). The order of the Court of Appeals for the District of Columbia Circuit denying a rehearing *en banc* was filed on October 7, 1985. (Pet. App. at 36a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Civil Service Reform Act of 1978 ("CSRA"), as amended and codified throughout 5 U.S.C.; the Administrative Procedure Act ("APA"), as amended, 5 U.S.C. 701 *et seq.*; and 5 C.F.R. 930.204 and 930.210(b) are found at Pet. App. 37a to 46a.

STATEMENT OF THE CASE

Petitioners are Administrative Law Judges ("ALJs") who challenge the refusal of the Office of Personnel Management ("OPM") to promote them to the GS-16 pay classification level while promoting other ALJs who performed the same duties as petitioners. They brought an action in the district court under the Administrative Procedure Act ("APA", 5 U.S.C. 701 *et seq.*), asserting that OPM's decision to classify them at a grade level below other ALJs who performed the same work was arbitrary and capricious. Pet. App. 6a.

The district court dismissed petitioners' complaint for lack of subject matter jurisdiction, relying upon the District of Columbia Circuit's decision in *Carducci* v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983), Pet. App. 28a. In *Carducci*, the court held that the district courts lack APA jurisdiction of federal employee challenges to agency personnel actions, if their complaints are cognizable under the Civil Service Reform Act ("CSRA", Pub. L. No. 95-454, 92 Stat. 1111, codified in scattered sections of Title 5, United States Code). The court identified three categories of agency actions covered by the CSRA: 1) certain specified major ("adverse") actions (*e.g.* removals, demotions and suspensions of more than 14 days) which are appealable to the Merit Systems Protection Board ("MSPB"), 5 U.S.C. 7512, 7701; 2) specified minor personnel actions infected by specified improper motives ("prohibited personnel practices") which are appealable to the MSPB's Office of Special Counsel ("OSC"), 5 U.S.C. 1206; and 3)

minor personnel actions not infected by improper motive, for which there is no appeal.[1] The court held that actions falling under these three categories must be pursued under the CSRA or not at all, and are not properly brought before the district courts under the APA. 714 F.2d at 175.[2]

In this case, the district court concluded that the challenged action did not rise to the level of an adverse action but arguably stated a prohibited personnel practice under 5 U.S.C. 2302(a)(2)(A)(x) as an arbitrary and inequitable change in petitioners' duties which is inconsistent with their salary or grade level. The district court thus concluded that the disputed action fell under *Carducci* category #2 and that APA jurisdiction was therefore unavailable.[3]

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[1] Under the "prohibited personnel practices" section of the CSRA, "personnel actions" are defined as appointments, promotions, disciplinary or adverse actions, details, transfers, reassignments, reinstatements, restorations, reemployment, performance evaluations, decisions concerning pay, benefits, awards or training, and other significant changes in duties or responsibilities inconsistent with the employee's salary or grade. 5 U.S.C. 2302(a)(2).

[2] The Court also expressed its concern that:

> [T]he exhaustive remedial scheme of the CSRA would be impermissibly frustrated by permitting far lesser personnel actions not involving constitutional claims, an access to the courts more immediate and direct than the statute provides with regard to major adverse actions.

714 F.2d at 174.

[3] The district court noted that petitioners' claims concerned a personnel action (a significant change in duties inconsistent with the employee's salary or grade, 5 U.S.C. 2302(A)(2)(A)(x)), that it is a prohibited personnel practice to violate a law, rule or regulation which implements or directly concerns a merit system principle (*id.* 2302(b)(11)) and that the merit principles insure them of fair, and equitable treatment and equal pay for work of equal value (*id.* 2301(b)(2) and (3)). The district court reasoned that the petitioners' challenge to their grade classifications constituted a complaint that OPM had violated laws implementing the above merit principles and that their claims therefore alleged a prohibited personnel practice; *Carducci* category #2. Pet. App. 28a.

On appeal, the D.C. Circuit agreed with the district court that this case was governed by the decision in *Carducci* (Pet. App. 12a-13a) and that the ALJs' claim stated a prohibited personnel practice; it thus held that their only recourse was to the Office of the Special Counsel. Pet. App. 14a, n.8.[4]

REASONS FOR GRANTING THE WRIT

I. THE DISMISSAL OF PETITIONERS' COMPLAINT IS NOT SUPPORTED BY THE CIVIL SERVICE REFORM ACT AND IS CONTRARY TO FUNDAMENTAL PRINCIPLES OF ADMINISTRATIVE LAW

In *Carducci*, the D.C. Circuit held that the CSRA precluded APA review of all matters covered by the CSRA's administrative enforcement scheme. The court held that the CSRA covers two types of personnel actions: major actions and minor actions. The CSRA provided for direct MSPB review of specified major actions; for minor actions there is no administrative review unless the action is infected by a specified improper motive (prohibited personnel practices), in which case the statute provides for investigation by the OSC. The D.C. Circuit held that the CSRA's administrative enforcement scheme would be impermissibly frustrated if covered actions could be challenged in the district courts under the APA. 714 F.2d at 175.

The personnel matter at issue in this case is not one of the actions enumerated in the CSRA. Although the refusal to classify petitioners at a higher grade level is unquestionably a significant action, it is not an "adverse

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[4] The Court recognized that its decision was contrary to the First Circuit's decision in *Dugan v. Ramsay*, 727 F.2d 192 (1st Cir. 1984). However, it held that the *Dugan* decision conflicts with *Carducci*, which is binding precedent in the D.C. Circuit and thus could be overruled only by an *en banc* decision. (Pet. App. 12a-13a). Petitioner's subsequent request for rehearing *en banc* was denied. Pet. App. 36a.

action" covered and thus preempted by the CSRA under *Carducci's* category #1. Further, petitioners have not alleged that the agency's decision was infected by improper motive, so their complaint does not state a prohibited personnel practice.[5] Nevertheless, the court below has expanded the rule in *Carducci* so as to preclude district court APA review of this matter, review which was traditionally available prior to passage of the Civil Service Reform Act.

The D.C. Circuit reached its result by expanding *Carducci* category #2 (prohibited personnel practices) far beyond the limits set forth by the *Carducci* court and by the statute. In fact, the court construed category #2 so broadly that any federal personnel action which is challenged as arbitrary and contrary to law would allege a prohibited personnel practice. Thus the combined effect of the decision in this case and the decision in *Carducci* is to preclude district court APA review of all challenges to unlawful and arbitrary personnel actions.[6]

This rescission of district court APA jurisdiction is not supported by the language or legislative history of the CSRA and is contrary to the well-established principle that the availability of an administrative remedy will not bar judicial review of agency action "absent clear and convincing evidence that Congress so intended." *Rusk*

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[5] Nor can this matter be classified as a minor personnel action for which there is no review (*Carducci* category #3). As the D.C. Circuit has recognized (Pet. App. at 12a), there are extremely few actions which fall into the unreviewable category. Furthermore, this case concerns petitioners' annual rate of pay, hardly a minor matter. Additionally, since such disputes were routinely heard by the district courts prior to the enactment of the CSRA (see discussion *infra*), there is a strong presumption that Congress did not intend to make such disputes unreviewable.

[6] In *National Treasury Employees Union* v. *Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984), the court held that, notwithstanding the rule in *Carducci*, district court APA review was still available in pre-enforcement challenges to agency rule-making.

v. *Cort*, 369 U.S. 367, 379-80 (1962). *See also Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-141 (1976); *Lindahl* v. *Office of Personnel Management*, —— U.S. ——, 105 S.Ct. 1620, 1627 (1985). The presumption against preclusion of APA review is particularly st ong in this case since the courts have historically had APA jurisdiction of employee challenges to agency classification decisions. *See Ward* v. *Campbell*, 610 F.2d 231 (5th Cir. 1980); *Todd* v. *Campbell*, 446 F. Supp. 149 (D.D.C. 1978); *Nederostek* v. *Adams*, 449 F. Supp. 286 (D.D.C. 1978).[7] In this case, neither the statute nor the legislative history indicate that Congress specifically intended to eliminate district court APA jurisdiction of classification disputes. Furthermore, the CSRA provides no new remedy for wrongful classification to take the place of the traditional APA review. Therefore, the D.C. Circuit erred in holding that the district court had no jurisdiction of this case.

The plain language of the CSRA does not support the D.C. Circuit's decision. While the CSRA enumerates all of the specific types of major personnel actions which fall into *Carducci* category #1,[8] it does not exhaustively identify all "minor" personnel actions which are either appealable to OSC, or not remediable at all. Rather, the statute focuses on the state of mind of the official taking

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[7] In addition to classification challenges, the courts have also had APA jurisdiction of challenges to other similar personnel actions, *e.g.*, *Haneke* v. *Secretary of Health, Education, and Welfare*, 535 F.2d 1291, 1296-7 n.10 (D.C. Cir. 1976)—challenge to employee's placement in Wage Grade Pay System rather than General Schedule; *Patternmakers League of North America* v. *Campbell*, 619 F.2d 826 (9th Cir. 1980)—challenge to transfer from special pay rate schedule to General Schedule.

[8] Specifically: removals, demotions, furloughs of 30 days or less and, since petitioners are ALJs, all suspensions (for all other employees only suspensions of more than 14 days are major actions). 5 U.S.C. 7512, 7521.

the action as the determinant of whether a prohibited personnel practice has been committed.[9]

It is clear that the action at issue in this case, a refusal to reclassify a position, falls into none of the *Carducci* categories. It is inconceivable that a decision concerning an employee's annual salary (here a matter of several thousand dollars each year) could be characterized as a minor action, but it is not one of the "major" personnel actions specified in and remediable under the Act. In contrast, for example, a suspension or a furlough for less than 30 days is a major action, fully remediable in administrative proceedings with direct judicial review. Moreover, petitioners have not alleged, nor can there be discerned, any improper motive on the part of the agency such that their claim would obviously state a prohibited personnel practice. The action is thus neither a specified major action, a specified minor action infected with improper motive, nor a minor action too trivial to be remediable at all.

However, the court below concluded that petitioners' claim states a prohibited personnel practice remediable under the Act because it alleged a violation of a law implementing a merit system principle. It noted that the merit principles protect employees from arbitrary action (Section 2301(b)(8)), require fair and equitable treatment of employees (*id.* (b)(2)), and mandate equal pay for work of equal value (*id.* (b)(3)). Since petitioners asserted that their position classification was too low, in violation of the Classification Act, the court reasoned that petitioners had alleged a violation of a law (the Classification Act) which implemented the merit principles.

[9] Thus, the statute identifies such actions as discrimination (Section 2302(b)(1) and (10)), political coercion (*id.* (b)(3)), favoritism and interference with the employment selection process (*id.* (b)(4)-(6)), nepotism (*id.* (b)(7) and reprisals for protected activity (*id.* (b)(8)-(9)) as prohibited personnel practices. The statute also identifies as prohibited personnel practices actions which violate laws, rules or regulations which implement the merit principles. *Id.* (b)(11).

The problem with the court's analysis is that it converts any arbitrary action into a "prohibited personnel practice," and then reads the statute to preempt judicial review, a preclusive effect absolutely unjustified by the statute or the intent of Congress. Under the court's analysis, any federal personnel action which is challenged as arbitrary and unlawful would allege a prohibited personnel practice, since the civil service laws are designed to insure fair treatment of federal employees. This interpretation of the statute dramatically broadens the prohibited personnel practice section of the statute beyond anything intended by Congress, and improperly infers a Congressional intent to remove from the jurisdiction of the district courts, matters which were traditionally reviewable under the APA. Furthermore, because the Special Counsel merely investigates alleged prohibited personnel practices and has the discretion to decide whether to take a case to the MSPB, a decision subject only to very limited judicial review (*Borrell* v. *U.S. International Communications Agency*, 682 F.2d 981, 988 (D.C. Cir. 1982); *Wren* v. *Merit Systems Protection Board*, 681 F.2d 867, 872-4 (D.C. Cir. 1982)), the scheme envisioned by the court below would leave petitioners without any judicial review if the OSC refuses to proceed with the case. Thus, no judicial review would be available even though such cases were routinely decided by district courts prior to the enactment of the CSRA.

[10] Under the court's reasoning, any action said to violate broad merit principles would be remediable *only* by resort to the Special Counsel. For example, the Privacy Act (5 U.S.C. 552(a)) is a law which implements the merit principle that employee privacy is to be protected (5 U.S.C. 2301(b)(2)). Violation of that principle is both a violation of the Privacy Act itself and a prohibited personnel practice since the Privacy Act implements the merit principle which

A review of the prohibited personnel practice section of the statute demonstrates that the D.C. Circuit has drastically changed the scope of that provision. Congress was concerned about discrimination, nepotism, political coercion, and reprisals against employees who engage in protected activity (Section 2302(b)(1)-(10)). It did not create a general prohibition of arbitrary action remediable only by the OSC. Although Congress did describe violations of laws implementing or directly concerning the merit principles as "prohibited personnel practices" (Section 2302(b)(11)), there is no evidence in the statute, or its legislative history, that subsection (b)(11) was intended to comprehend all allegations of arbitrary action. In fact, the House bill contained no prohibited personnel practice provision analogous to Section 2302(b)(11); the Senate bill made it a prohibited personnel practice to violate a law, rule or regulation "implementing or relating to the merit system principles." Joint Explanatory Statement of the Committee on Conference, H.R. Rep. 95-1717, 95th Cong. 2d Sess. (1978) at 131. The conferees adopted Section 2302(b)(11) as a substitute for the Senate provision, making unlawful violations of laws, rules, or regulations "which do not fall within the first 10 categories of prohibited personnel practices." However, the provision was "modified so that the law, rule or regulation must 'directly concern' a merit system principle, in order to be actionable as a prohibited personnel practice." *Ibid.*

The conferees were even more explicit in their discussion of "EXCLUSIONS FROM COVERAGE OF THE

protect employee privacy rights (5 U.S.C. 2302(b)(11). Yet the employee's right to enforce the statutory privacy rights in district court remains, and should remain, unaffected by the possible availability of alternative relief from the Special Counsel. Particularly where the Special Counsel remedy is of doubtful applicability or efficiency, as here, there is no warrant for extinguishing a pre-existing APA cause of action, any more than the Privacy Act cause of action could be extinguished.

MERIT SYSTEM PRINCIPLES AND PROHIBITED PERSONNEL PRACTICES," stating "[u]nless a law, rule or regulation implementing or directly concerning the principles is violated (as under Section 2302(b)(11)), the principles themselves may not be made the basis of a legal action by an employee or agency." *Id.* at 128.[11] It is apparent that subsection (b)(11) was merely intended to allow employees to bring to the OSC complaints similar to the 10 specifically enumerated prohibited personnel practices. If Congress had intended subsection (b)(11) to have the broad scope inferred by the D.C. Circuit, it surely would have indicated such purpose in its discussion of that provision. While it is clear that Congress established the OSC to provide federal employees with a method to challenge *any* personnel action which was infected by improper motive, there is no evidence that it thereby intended to extinguish pre-existing rights to judicial redress for violations of law.

Additionally, the analysis of the court below would render the remainder of Section 2302(b) meaningless. If subsection (b)(11) meant that all unfair and arbitrary actions were prohibited personnel practices, then the preceding ten specific prohibited personnel practices would be unnecessary since discrimination, nepotism, favoritism, political coercion, and reprisals for protected activity are inherently unfair, arbitrary and contrary to civil service law. Thus, the court has interpreted subsection (b)(11) to encompass far more than Congress

[11] For example, an employee may not challenge a training assignment as a prohibited personnel practice by alleging a violation of the merit principle mandating that employees receive effective training (5 U.S.C. 2301(b)(7)). However, the employee may file a prohibited personnel practice alleging that training selections were not in accordance with an agency's merit promotion procedures as required by 5 C.F.R. 410.301(a)(1)—a regulation which implements the merit principle concerning training.

ever intended.[12] The court below has also stretched the merit principles which were purportedly violated beyond any reasonable interpretation of those provisions. The merit principle which protects employees from arbitrary action specifically addresses personal favoritism, political coercion, and interference with elections;[13] the merit principle which concerns fair and equitable treatment specifically addresses discrimination and the protection of privacy and constitutional rights;[14] and the merit

[12] In contrast, the court's decision in *Carducci*, as well as the cases relied upon in that decision, are consistent with the CSRA scheme. *Carducci* concerned a challenge to a reassignment, due to alleged unacceptable performance, which did not result in loss of pay or grade. There can be little dispute that district court APA jurisdiction can reasonably be precluded where no injury was sustained. The cases relied upon by the *Carducci* court which addressed specific prohibited personnel practices also unexceptionally applied the CSRA. *See Borrell* v. *U.S. International Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982) (discharge allegedly in retaliation for "whistle blowing") and *Cutts* v. *Fowler*, 692 F.2d 138 (D.C. Cir. 1982) (reassignment allegedly resulting from discrimination on the basis of marital status). In those cases, the D.C. Circuit correctly held that those employee complaints alleged actions which clearly stated specific prohibited personnel practices. However, the instant case does not concern specific prohibited personnel practices; nor does it concern a prohibited personnel practice under Section 2302(b)(11).

[13] Section 2301(b)(8) provides:

> Employees should be—
>
> "(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and
>
> "(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

[14] Section 2301(b)(2) provides:

> All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

principle which mandates equal pay for work of equal value specifically addresses the establishment of statutory pay rates (*e.g.*, the General Schedule), and not the classification of employees within those pay systems.[15] Furthermore, the court did not identify any provision of the Classification Act which allegedly implements the above principles, a necessary prerequisite to a prohibited personnel practice under subsection (b)(11).

Thus, in addition to an overbroad reading of subsection (b)(11), the court below relied on extremely strained interpretations of the relevant merit principles in holding that petitioners' complaint states a prohibited personnel practice so as to preclude any challenge to their classifications in the district court under the APA. Given that access to the courts under the APA is presumed in the absence of clear and convincing evidence to the contrary, that the district courts have historically heard APA challenges to agency classification decisions, and that OSC decisions not to proceed with employee complaints are subject to extremely limited judicial review, the reasoning of the court below cannot support its conclusion that the CSRA precludes district court jurisdiction of this action. Thus, the decision in this case is plainly contrary to the Administrative Procedure Act.

[15] Section 2301(b)(3) provides:

> Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

II. THE D.C. CIRCUIT'S DECISION CONFLICTS WITH DECISIONS IN THE FIRST CIRCUIT AND THE FEDERAL CIRCUIT

The decision of the court below is in direct conflict with that of the First Circuit in *Dugan* v. *Ramsay*, 727 F.2d 192 (1st Cir. 1984). There, the Court of Appeals specifically rejected the D.C. Circuit's analysis of the preemptive effect of the CSRA, and reached "a conclusion clearly contrary to *Carducci*" (Pet. App. 12a). The First Circuit refused to infer a Congressional intent to preclude district court APA review of a challenge to a personnel action merely because Congress did not provide for MSPB review of the action. The Court observed that to infer such a bar on APA review "runs counter to the strong presumption in the law that favors reviewability and almost never implies statutory preclusion of review from Congressional silence." 727 F.2d at 195.

The D.C. Circuit's decision is also in conflict with the Federal Circuit's decision in *Saunders* v. *Merit Systems Protection Board*, 757 F.2d 1288 (Fed. Cir. 1985). There, as in *Gray*, a federal employee claimed that he should have been classified at a higher grade level. The Federal Circuit affirmed the MSPB's dismissal of the employee's appeal because the Board lacks appellate jurisdiction of classification matters. The court also rejected the employee's claim that the employing agency and OPM had committed a prohibited personnel practice by refusing to compare his position to higher graded positions. The court stated that the Board lacks appellate jurisdiction to consider such matters. Although it might be inferred that a case brought to the OSC, rather than directly to the Board, would receive consideration, that route could hardly be considered efficacious, since it depends upon the MSPB for enforcement, and since the MSPB has already read its jurisdiction over such matters very narrowly. *Wren* v. *Merit Systems Protection Board*, 681 F.2d at 873-4. Thus, the decision of the court below

is in conflict with decisions in both the First and the Federal Circuits.[16]

CONCLUSION

Because the D.C. Circuit's decision is contrary to well established precedent under the APA and in conflict with decisions in other circuits, the Court should issue the writ of certiorari in this case.

Respectfully submitted,

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[16] The decision is also in conflict with the D.C. Circuit's own decision in *Etelson* v. *Office of Personnel Management*, 684 F.2d 98 (D.C. Cir. 1984). In that case, which was decided after the enactment of the CSRA, the court held that the district court had APA jurisdiction of the method used by OPM to evaluate candidates for ALJ positio